

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-01789-smb

4 - - - - - x

5 In the Matter of:

6

7 SECURITIES INVESTOR PROTECTION CORPORATION,

8 Plaintiffs,

9 v.

10 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, ET AL,

11

12 Debtor.

13

14 - - - - - x

15

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 June 19, 2014

21 10:40 AM

22

23 B E F O R E :

24 HON STUART M. BERNSTEIN

25 U.S. BANKRUPTCY JUDGE

Page 2

1 HEARING RE: Inter-Account Transfers -- Trustee's Motion
2 Affirming Application of Net Investment Method to Inter-
3 Account Transfers

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed by: Nicole Yawn

Page 3

1 A P P E A R A N C E S :

2 KLEINBERG KAPLAN

3 Attorneys for Claimant, Elin

4 551 Fifth Avenue

5 New York, NY 10176

6

7 BY: MATTHEW J. GOLD, ESQ.

8 LAWRENCE ELIN, ESQ.

9

10 BAKER HOSTETLER

11 Attorneys for the Trustee

12 45 Rockefeller Plaza

13 New York, NY 10111

14

15 BY: NICHOLAS J. CREMONA, ESQ.

16 SEANNA R. BROWN, ESQ.

17 AMY E. VANDERWAL, ESQ.

18

19 BECKER & POLIAKOFF

20 Attorney for Various Claimants

21 45 Broadway

22 8th Floor

23 New York, NY 10006

24

25 BY: HELEN DAVIS CHAITMAN, ESQ.

Page 4

1 K&L GATES, LLP

2 Attorney for 62 Claimants

3 1601 K Street NW

4 Washington, DC 20006-1600

5

6 BY: RICHARD A. KIRBY, ESQ.

7

8 MINTZ & GOLD, LLP

9 Attorney for Pro Se Claimant

10 470 Park Avenue South

11 New York, NY 10016

12

13 BY: ELLIOT G. SAGOR, ESQ.

14

15 LOEB & LOEB, LLP

16 Attorney for Upsher (ph) Laboratories

17 345 Park Avenue

18 New York, NY 10154

19

20 BY: WALTER H. CURCHACK, ESQ.

21

22

23

24

25

1 MILBERG, LLP
2 Attorney for
3 One Pennsylvania Plaza
4 New York, NY 10119

5

6 BY: MATTHEW A. KUPILLAS, ESQ.

7

8 SECURITIES INVESTOR PROTECTION CORPORATION
9 Attorney for SIPA
10 805 15th Street, NW
11 Suite 800
12 Washington, DC 20005-2215

13

14 BY: LAUREN T. ATTARD, ESQ.

15

16 HUNTON & WILLIAMS
17 Attorney for
18 200 Park Avenue
19 New York, NY 10166-0091

20

21 BY: ROBERT A. RICH, ESQ.

22

23

24

25

1 WINDELS MARX LANE & MITTENDORF, LLP

2 Attorney for

3 156 West 56th Street

4 New York, NY 10019

5

6 BY: YANI INDRAJANA HO, ESQ.

7

8 LAW OFFICES OF JOEL L. HERZ

9 Attorney for

10 3573 East Sunrise Drive

11 Suite 215

12 Tucson, AZ 85718-3206

13

14 BY: JOEL L. HERZ, ESQ.

15

16 ALSO APPEARING:

17 TRISHA KEERP (ph)

18 PAULA WORMITZ (ph), Stimmon (ph), Wormitz, P.C

19 JUSTIN BRASS, STONE LION CAPITAL PARTNERS (TELEPHONIC)

20 GAYTRI KACHROO, KACHROO LEGAL SERVICES, P.C. (TELEPHONIC)

21 JASON B. SANJANA, REORG. RESEARCH (TELEPHONIC)

22

23

24

25

1 P R O C E E D I N G S

2 THE COURT: Madoff?

3 MS. VANDERWAL: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MS. VANDERWAL: Amy Vanderwal, Baker Hostetler,
6 for the trustee. We're here today on the trustee's motion
7 seeking this Court's approval of the application of the net
8 investment methods inter-account transfers. We have one
9 housekeeping matter before we get started that we'd like to
10 address. It relates to a letter sent to Your Honor by
11 Mr. Gold on behalf of his client, Laurence Elin a couple
12 days ago raising issues related to two IRA accounts.

13 We have spoken with Mr. Gold, and he has agreed
14 with us that the issues he raised in the letter and in his
15 papers are outside the scope of this motion, and we have
16 agreed to work with him separately on resolving the issues
17 that he raised as they relate to his IRA accounts. Mr. Gold
18 has agreed that he will not participate in this hearing and
19 will not be bound by this proceedings, with the exception of
20 there was one inter-account transfer many years ago that is
21 unrelated to the issues that he raised in his letter. So
22 that would be affected by this --

23 THE COURT: I guess I don't understand what you're
24 saying. The issue is whether or not the trustee should
25 basically drill down to the transferor accounts and apply

1 the net investment benefit in determining how much has been
2 transferred.

3 MS. VANDERWAL: That's our issue today.

4 THE COURT: Are you saying that Mr. Erins (sic)
5 falls into that category?

6 MS. VANDERWAL: No, Mr. Elins (sic) raised a
7 different issue of the treatment of two IRA accounts, and,
8 as he set out in the letter that he submitted and in his
9 pleadings, he had an IRA account. He closed it. He took
10 his money out. He later reinvested, and it's just a
11 completely different issue that we need to resolve,
12 unrelated to inter-account transfers.

13 THE COURT: But I thought you said there was
14 something about this motion which did bind him.

15 MS. VANDERWAL: The only aspect that could
16 potentially implicate Mr. Elin's account is that a separate
17 account had an inter-account transfer. He has agreed that
18 this motion would apply to that transfer.

19 THE COURT: Okay. I guess I understand Go ahead.

20 MS. VANDERWAL: Okay. Thank you, Your Honor.

21 Getting back to the matter at hand, --

22 THE COURT: Yes. Wait.

23 MR. GOLD: Excuse me, Your Honor. Matthew Gold,
24 Kleinberg & Kaplan. I just want to add one clarifying
25 point, that the trustee has agreed that they will not be

1 contending that the transfer into the second IRA account was
2 an inter-account transfer.

3 THE COURT: I thought he closed one account and
4 then, a year later, opened up another account.

5 MR. GOLD: That's correct.

6 THE COURT: Okay. And he is a claimant with
7 respect to the second account?

8 MR. GOLD: That's correct.

9 THE COURT: So what's the issue with it?

10 MS. VANDERWAL: We agree that that is not an
11 inter-account transfer. That's why we have agreed that it's
12 not relevant to today's motion.

13 THE COURT: Okay.

14 MR. GOLD: And we hope there may be no issue.

15 We'll working with the trustee. We are going to carry this
16 to the next omnibus date.

17 THE COURT: That's beyond the scope of the matter
18 before me then.

19 Go ahead.

20 MS. VANDERWAL: Thank you, Your Honor. But as
21 Your Honor mentioned, the trustee has applied the net
22 investment method approved by the Second Circuit to
23 transfers between accounts at BLMIS. The Second Circuit
24 approves this approach under which the customer's net equity
25 is calculated by subtracting an amount withdrawn from an

Page 10

1 account from principal deposited it. The method looks only
2 to cash in and cash out and ignores the fictitious profit
3 reported on BLMIS customer statements.

4 In the account transfer setting, when an account
5 transfer occurred at BLMIS, meaning that no new funds came
6 in, there was merely a book entry that credited one account
7 and debited the other. The trustee has given credit to the
8 transfer up to the amount of principal in the transferor
9 account.

10 THE COURT: Does the trustee have books and
11 records regarding the transferor account that showed the
12 deposits and withdrawals?

13 MS. VANDERWAL: Yes.

14 THE COURT: Because the determination letters just
15 gave a number for the amount transferred and didn't show how
16 that amount was computed.

17 MS. VANDERWAL: The determination letters related
18 to the transferee accounts and showed the money coming in
19 for the transferor accounts. So, in calculating that
20 amount, we examined the deposits and withdrawals in the
21 transferor account to determine the --

22 THE COURT: Because the reason I raise it is, in
23 the trustee's response or perhaps in the objection, he said
24 a couple of times that he had given ample evidence to the
25 claimants regarding the amount of -- regarding, among other

1 things, I guess -- or I read it to mean the computation of
2 how much was transferred, and that's just not in the
3 determination letters.

4 MS. VANDERWAL: Correct.

5 THE COURT: It's not the subject of this hearing,
6 but I just mention that.

7 MS. VANDERWAL: Yeah, and those calculations were
8 completed, and that's how the net equity was determined.

9 The trustee submits that the approach adopted in
10 this matter is the only method that's consistent with the
11 net equity decision entered by the Second Circuit, the
12 district court's antecedent debt decision as well as New
13 York law. With respect to the net equity decision, as this
14 Court noted in ruling on a motion a few weeks back involving
15 Fishman Trust, there's no practical difference between a
16 withdrawal and a transfer for calculations of net equity.
17 In both cases, funds are leaving the account, and the
18 balance of that account is reduced.

19 Accordingly, the rationale for the net equity
20 decision applies equally here. The Second Circuit noted
21 that Madoff's so-called profits are after-the-fact
22 constructs that were arbitrarily and unequally distributed
23 among customers, and, accordingly, the net investment method
24 was superior. The Court also stated that allowing the
25 recovery of fictitious profits would affect the limited

Page 12

1 amount available for distribution from the customer funds
2 and that only the net investment method would allow the
3 trustee to make payments based on withdrawals and deposits,
4 which could be confirmed by the books and records and would
5 result in the appropriate distribution of customer property
6 under SIPA.

7 The same is true here, and the trustee has
8 adjusted the transfers out of the transferor accounts in the
9 same manner as account withdrawals are adjusted. This
10 approach was also considered by the district court in its
11 antecedent debt decision, and the district court
12 specifically looked at inter-account transfers and
13 determined that the net investment approach should be
14 applied to those transfers. The district court relied on
15 Judge Hardins' (ph) decision in Bayou (ph) and found that
16 shifting fictitious profits from one account to another did
17 not change those fictitious profits into actual principal.

18 Some claimants suggested that the district court's
19 finding isn't relevant here because it was in the avoidance
20 contracts, but, as Your Honor stated in the context of the
21 Fishman motion, there is no reason why these calculations
22 should be different in the claims context, and, indeed, the
23 calculation of a claim and the calculation of an avoidance
24 liability both involve the (sic) calculation and are flip
25 sides of the same plan.

1 The trustee's approach is also consistent with New
2 York law. It's long been recognized that a transferee
3 cannot acquire more than the transferor is able to give,
4 and, in this instance, the Second Circuit upheld the
5 transferor does not have a right to fictitious profit and
6 can, therefore, not transfer that profit to the recipient.

7 A few of the claimants also raised a statute of
8 limitations issue. This issue was dismissed by the district
9 court and the antecedent debt decision, finding that it was
10 entirely proper to include transfers going back beyond 2
11 years before the filing date, and, accordingly, section
12 546(e) of the code provides no assistance to the claimants
13 on this issue, that neither could use calculated (sic) over
14 the life of the account.

15 The Second Circuit found that to be appropriate.
16 The district court found that to be appropriate. Other
17 circuits -- the Donald (ph) decision in the Ninth Circuit
18 found that to be appropriate, and it makes sense because
19 there is no other way to figure out when withdrawals started
20 exceeding deposits, so when fictitious profits started to
21 exist in that account.

22 Claimants also argued that the funds could have
23 been withdrawn and reinvested, and, in some cases, that
24 would have given them the advantage of the statute of
25 limitations and state that the trustee is elevating form

1 over substance in this regard, but, to the contrary,
2 Your Honor, looking at the substance of the transfers, the
3 taxes (sic) of the transfers did stay in the BLMIS and that
4 the substance of those transfers was fictitious profit.
5 Just because the transfer occurred more than two years ago,
6 it doesn't transform that into principal. I would also add
7 that the argument made in several oppositions that general
8 policies in favor of finality in appropriate transactions
9 undercut the trustee's approach are essentially statute of
10 limitations arguments, which don't really succeed for the
11 same reasons just mentioned.

12 I just want to address two other issues that were
13 raised regarding SIPA and the series (sic) 100 rules.
14 Certain claimants have argued that the trustee is improperly
15 combining accounts, and that is in violation of the series
16 100 rules. The series 100 rules state, you know, when an
17 account should be -- claimant has multiple accounts and when
18 they're treated in one capacity and when they're treated in
19 separate capacities, but, in this case, the accounts have
20 not been combined, and that equity in each account was
21 determined separately.

22 Withdrawals and deposits were debited and credited
23 separately, and the only relation between the account is the
24 transfer, and the transfer was tracked between the two
25 accounts. So the mere tracking of a transfer does not

1 combine the two accounts, in violation of the series 100
2 rules.

3 There is also -- some claimants also asserted that
4 the trustee is improperly redefining that equity through his
5 approach, but, as the Second Circuit determined, because
6 there were no securities purchased, the trustee had to look
7 to the books and records to determine what assets actually
8 existed and what comes (sic) to a customer property. It did
9 the same thing in this instance as it did in the net equity
10 instance, and there has been no attempt to redefine that
11 equity.

12 I would just end by saying as the scheduling order
13 and (sic) as this matter stated, it's purely a legal inquiry
14 whether the net investment method should be applied to
15 inter-account transfers. So many of the oppositions raised
16 account-specific issues, and the trustee tried to categorize
17 and summarize those issues in his reply brief. None of the
18 issues raised are relevant here today or change the
19 appropriateness of the method, nor do they need to be
20 resolved for the trustee to move to rule on this motion.
21 They're either disguised legal issues that have no bearing,
22 or they're issues that will be adjusted in later proceedings
23 such as claims and pooled accounts or shared accounts.

24 In closing, as has been said many times in this
25 case before, a Ponzi scheme is a zero sum game, and any

Page 16

1 award of a fictitious profit means less principal to be
2 shared among those who invested more than they withdrew.

3 THE COURT: Thank you.

4 MS. ATTARD: Good morning, Your Honor. Lauren
5 Attard, for the Securities Investor Protection Corporation.

6 First, I'd just like to talk about the burden of
7 proof in a SIPA liquidation. Customer claims --

8 THE COURT: Is this what I have to decide in
9 connection with this motion?

10 MS. ATTARD: Customers have raised it in their
11 objections in that the trustee -- they're stating that the
12 trustee had not satisfied his burden of proof, but, to the
13 extent it's a legal issue, I agree. I don't think it's
14 relevant to this motion. I just want to make sure that it's
15 clear that the customers' burden of proof -- it is the
16 burden (sic).

17 THE COURT: But, under the statute, when the
18 trustee receives a claim, --

19 MS. ATTARD: Uh-huh.

20 THE COURT: -- he's got to pay it, to the extent
21 he can determine or he agrees that that's the net equity,
22 based on the books and records or however else he determines
23 it. So, if he doesn't pay the claim he receives, doesn't he
24 have some burden to at least explain initially why he hasn't
25 paid it?

1 MS. ATTARD: He has a burden to explain to
2 determine the claim, and that's the part of the claims
3 procedures order that's in this case and that's been in
4 every civil liquidation.

5 THE COURT: Right.

6 MS. ATTARD: And he can determine the claim based
7 on the books and records of the debtor but to the
8 satisfaction of the trustee ultimately, and so, the trustee
9 can determine that a claim is denied.

10 THE COURT: Let me give you -- and this has been
11 raised by a couple of the claimants. When you look at the
12 determination letters, as I've mentioned, they don't really
13 say how the trustee came up with the value of the transferor
14 account at the time of the transfer.

15 MS. ATTARD: Right.

16 THE COURT: Are you say that it's the claimant's
17 obligation to show that that one number isn't correctly
18 computed, or is it the trustee's obligation in the first
19 instance to show how he came up with that number?

20 MS. ATTARD: Sure. I believe it's the claimant's
21 obligation whenever we are -- the trustee receives a
22 discovery request, the trustee has been providing
23 documentation to the extent necessary. The claims go
24 through such a review. There's so many steps in the review
25 of those claims. So --

1 THE COURT: But doesn't the trustee have to show
2 that in the first instance?

3 MS. ATTARD: So you're suggesting that the trustee
4 would have to provide more information than his
5 determination letters?

6 THE COURT: Wouldn't he have to make a *prima facie*
7 showing of some sort that --

8 MS. ATTARD: As --

9 THE COURT: -- the claim that they submitted was
10 not correct, and here is why I think it's correct?

11 MS. ATTARD: Sure. As Judge Broadsman (ph) held
12 in the Stratton Oakmont case, no.

13 THE COURT: Go ahead.

14 MS. ATTARD: I can give you the cite, but -- 228
15 B.R. 278.

16 THE COURT: I know the case.

17 MS. ATTARD: She talks about how it's similar to a
18 priority claim in bankruptcy. Judge Garrity in Adler
19 Coleman also talked about the same, that it's the customer's
20 burden because a customer claim is a priority claim. It's
21 the customer's burden to show that the customer is entitled
22 to customer property and that what the customer is seeking
23 is customer property.

24 It's important -- actually, this becomes really
25 important in other cases like MF Global, where there are

1 customers who had full securities claims and commodities
2 claims, which are not protected by SIPA. So I think it's an
3 important distinction that it is the customer's burden, but
4 obviously, to the extent we have documents, we do not
5 withhold those documents. We try to provide as much as we
6 can to customers, to the extent that they think that there's
7 documents that are going to prove their case, but we're not
8 going to put something in a determination letter that we
9 don't have the backup to --

10 THE COURT: And I should take your word for that,
11 right?

12 (Laughter)

13 MS. ATTARD: I guess maybe our 40 years of doing
14 this, maybe. Maybe that counts.

15 THE COURT: Because the government never makes a
16 mistake.

17 MS. ATTARD: Well, we're not the government, but
18 --

19 THE COURT: That's true.

20 MS. ATTARD: So --

21 THE COURT: All right.

22 MS. ATTARD: And the other thing I just want to
23 bring up, even though I think this was dealt with in our
24 papers, but it just comes up. Madoff has been in existence
25 since 1960 (indiscernible - 53:35) with the SEC changed to

Page 20

1 an LLC, as many entities did, from self-rock (sic) to an LLC
2 in 2001. There's been no change. He's been a member since
3 1970 since SIPA started. So thank you.

4 THE COURT: Thank you.

5 Who wants to go first?

6 MR. KIRBY: Your Honor, Richard Kirby, K&L Gates,
7 on behalf of 62 claimants who have filed an omnibus
8 objection in this matter.

9 I think it would be useful first to describe our
10 clients and a common theme among the parties that are
11 raising this objection. Our clients are each the recipients
12 of inter-account transfers. The people who are objecting on
13 this are no the people who transferred or the transferors.

14 Each got at the time of the claim determination
15 little or no information about the transfer, how it was
16 computed. All they simply got was a statement that said
17 your claim is denied because -- and there was a writedown
18 for that amount, and how it came to be that it was written
19 down wasn't explained.

20 And at this point in this motion, the trustee
21 hasn't also sought out to explain other than, as Ms. Attard
22 stated, --

23 THE COURT: Well, let's the issue I raised just
24 now, but, assuming that the trustee explains to your
25 satisfaction how he computed your clients' claims, do you

1 object to the application of the net investment method?

2 MR. KIRBY: Yes.

3 THE COURT: Okay. So the fact that you don't know
4 how he did it doesn't matter?

5 MR. KIRBY: Right.

6 THE COURT: Okay. So let's go (sic).

7 MR. KIRBY: I agree. The burden of proof issue is
8 not before the Court at this time.

9 THE COURT: Okay.

10 MR. KIRBY: It's a pure legal issue. We believe
11 the trustee's method is flawed for four reasons. First, he
12 fails to give effect to the transfer that he admits was
13 recorded on the books and took place.

14 THE COURT: But isn't that true under the net
15 investment method?

16 MR. KIRBY: No, because the net investment method
17 didn't deal -- and the Second Circuit didn't address the
18 issue of inter-account transfer.

19 THE COURT: No, but it dealt with the issue of
20 whether or not you credit the transfer of profit, fictitious
21 profits, didn't it?

22 MR. KIRBY: Transferor, yes, but it was the
23 transferee. This is a transferee. This is a separate
24 account.

25 THE COURT: So why is it different?

1 MR. KIRBY: It's different because the customer on
2 the recipient is a separate account holder who has separate
3 rights, and, when you think through the process, okay, what
4 the step that took place when the transfer took place, the
5 transferor is, in effect, exercising dominion and control
6 over the assets in order to authorizes the deposit into the
7 transferee account. What that means is that, once they
8 exercise dominion and control over it, then the transfer is
9 -- and the recipient account -- it's as if the transferor
10 took the cash out and deposited it in the transferee
11 account.

12 And so, what we are saying is fully consistent
13 with the net equity investment method. Okay? And fully
14 consistent with the statute that what the way this needs to
15 be treated is in the recipient account, the cash that was
16 recorded on the books as deposited is what the recipient
17 has. Now, if --

18 THE COURT: Including the fictitious profits?

19 MR. KIRBY: Your Honor, we use -- there's a term
20 used, fictitious profits.

21 THE COURT: Well, we all know what it means.

22 MR. KIRBY: Okay. We understand what it means,
23 but the statute gives the trustee a remedy a deal with them,
24 and the problem is what the trustee is not following the
25 statute, which says if I don't -- I think a transfer is

Page 23

1 invalid. He has to set about and avoid it. Once he --

2 THE COURT: But he's not avoiding the transfer.

3 He's just -- your clients have made claims against the
4 estate, and he's computing the amount of the claim. That's
5 all.

6 MR. KIRBY: But he is, in effect, avoiding the
7 transfer.

8 THE COURT: Well, I --

9 MR. KIRBY: And he's trying to pretend that it
10 didn't happen. And what he is doing that is erroneous here
11 is that he's first not following the instructions of the
12 statute that, if you're going to disregard a transfer that
13 he admits took place -- I mean, it's different if there was
14 a dispute about whether the transfer took place, but here,
15 in his claim determination, he's admitted that a transfer --

16 THE COURT: But isn't there a dispute about
17 whether there's a transfer of fictitious profits? In other
18 words, your argument is essentially that the transferee got
19 what was depicted on the statement at the time.

20 MR. KIRBY: Correct.

21 THE COURT: Including all the stocks that were
22 depicted on the statement at the time, but they didn't
23 exist. So why can't the trustee ignore the fiction when
24 he's computing the net equity of the account?

25 MR. KIRBY: He can for the transferor, but, for

1 the transferee, who has separate rights under the statute,
2 he can't do that. What he --

3 THE COURT: Okay. That's what I'm not
4 understanding.

5 MR. KIRBY: Okay.

6 THE COURT: Why he can't do that.

7 MR. KIRBY: Because what the statute provides is
8 that what the customer -- to take a look at it from the
9 perspective of the transferee or the recipient account.
10 What he gets recorded and the statute -- not stocks, because
11 cash is recorded as being deposited in this account. That's
12 how we understand the books and records recorded it. Okay?

13 But then, the transferee gets assets that he makes
14 some decisions to keep in Madoff. He enters into -- in
15 entering into an account. We assume that, in each case, and
16 certainly, for our clients that we're talking about, each
17 client had a standard customer agreement with Madoff that
18 gave him discretion to invest it, and that recipient
19 account, if there were fictitious profits or profits that
20 were earned on that based upon the principal of his deposit,
21 then that investment decision controls how that is to be
22 computed.

23 But where we draw the line and we think that it's
24 important that the trustee follow the statute is that, once
25 you accept the principle that there is a transfer and the

1 books and records reflect that, then the trustee has to take
2 step, which he is not doing, and that is the step he needs
3 to bring a proceeding to avoid the transfer. That gives the
4 defendants the right to raise such issues as may be
5 appropriate in response.

6 Now, we have some good understanding as to why the
7 trustee wants to not take that step, because many of these
8 transfers took place in the '80s and '90s, and he has
9 problems. We have clients that go back into the '80s when
10 these transfers took place, and so, the trustee uses this
11 method that is an end run, essentially, around the avoidance
12 obligations under the statute.

13 Our point is this. The SIPA statute incorporates
14 by reference chapter five of the statute, and the statute
15 says that chapter five applies and if the trustee wants to
16 avoid an obligation or a transfer, he is empowered to do
17 that. A SIPA trustee is also empowered to do that, but he
18 has to take that step.

19 That is also consistent with the provision in the
20 statute that requires each account holders that's a separate
21 account holder to be treated distinctly. And, while my
22 colleague today says well, this is really not a collapse in
23 the accounts, but fundamentally, that is a collapse in the
24 accounts.

25 THE COURT: Okay.

Page 26

1 MR. KIRBY: Okay? So we have taken a look at
2 Your Honor's decision in the Fishman case, and --

3 THE COURT: Well, Fishman is a slightly different
4 factual situation. They were claiming the transfer never
5 occurred.

6 MR. KIRBY: Agreed, and the party that wasn't
7 before you, which is our clients, which were the recipient
8 parties, and so, while we don't disagree with the conclusion
9 that the Court made, vis-à-vis the transferor account, the
10 net equity decision has decided what the transferor had the
11 power to decide to transfer. But, with respect to the
12 recipient account, it's a very different situation, and so,
13 we do not see any issue with that.

14 Now, we heard my colleague this morning talk about
15 the Second Circuit decision in net equity. It did not
16 address this issue. Whether the facts weren't presented to
17 the Court and the Court did not address the issue. What the
18 Court looked to is the statute. When you look to the net
19 equity definition, it's very clear that separate account
20 holders are to be treated separately, and what that means
21 is, when you apply the statute, is that the trustee must
22 take the steps necessary in order to avoid the transfers.

23 Now, I'd also like to address for a minute
24 Judge Rakoff's decision on antecedent debt. We believe that
25 that case is readily distinguishable, and that is because,

Page 27

1 first of all, as Judge Rakoff has reiterated on several
2 times, the issue before him was not the question of how you
3 interpret a SIPA claim and how you calculate net equity. In
4 fact, he has consistently remanded that issue back to the
5 bankruptcy court for determination.

6 It would not be in the ordinary course of the kind
7 of issue that would be before district court on a stern --
8 what I will use the recent Sprinkler (ph) case calls a stern
9 type case. It's not an avoidance case. What he was
10 deciding is value and how to treat it for value purposes,
11 and that had nothing to do with the question of how a SIPA
12 trustee must go about determining net equity in a separate
13 account. So we don't believe that statute, that provision
14 is applicable.

15 It's our position, therefore, that the trustee, in
16 determining net equity, must take the cash that was recorded
17 on the customer -- recipient/customer's account as cash.
18 That's the starting place for our clients' net equity claim.
19 If he is going to write that claim down, he has to take the
20 step to do that, which the statute requires, provides for,
21 and there's nothing in SIPA that would be inconsistent with
22 the requirement that the trustee take a step to avoid the
23 obligations or the transfers that are recorded on the books.

24 It's one thing that what was presented to the
25 Second Circuit, which was the books and records were false

Page 28

1 with respect to so-called profits or fictitious profits or
2 securities. But, when the trustee admits that there was a
3 transfer as recorded on the books and when he admits that
4 there is -- the transferee account is the recipient of that
5 money, then, once you take that step, then the trustee must
6 take the steps provided in the statute in order to set those
7 aside. Otherwise, the customers are going to be left with
8 where we are today.

9 We have no idea, for most of our customers, what
10 the circumstances of the transfer account were.

11 THE COURT: That's an issue of proof, and I asked
12 you at the beginning if you knew --

13 MR. KIRBY: I understand that.

14 THE COURT: -- it'd make a difference to you.

15 MR. KIRBY: But --

16 THE COURT: You said no.

17 MR. KIRBY: But that would allow -- in such a
18 proceeding, that would flush out those issues.

19 THE COURT: But that would be true in a claims
20 determination proceeding also.

21 MR. KIRBY: Well, yes, but remember, Your Honor.

22 Under the SIPA statute, the trustee's number one obligation
23 is to promptly decide these customer claims. Because, you
24 know, the whole purpose of the SIPA statute is to expedite
25 returning customer property to customers. Here we are, soon

1 be six years, five-and-a-half years --

2 THE COURT: And some litigation (indiscernible -
3 1:16:58).

4 MR. KIRBY: Understand.

5 THE COURT: The issues that affect that --

6 MR. KIRBY: Understand, Your Honor. But the point
7 is is to suggest that, somehow at this late date, the
8 customers have the obligation to try to figure out why the
9 trustee --

10 THE COURT: That's a different issue.

11 MR. KIRBY: Okay.

12 THE COURT: And you said it doesn't matter to your
13 argument, because, even if he could show you how he did it,
14 it wouldn't make a difference.

15 MR. KIRBY: And that's my point. Okay? Our point
16 is straightforward and simple that, until the trustee takes
17 the steps provided in the statute, he has to treat the
18 recipient account as a distinct holder who received cash as
19 recorded on the books, and that's not disputed, that cash
20 was recorded on the books as it deposited in the customer's
21 account.

22 Okay. Once you accept that that's not disputed,
23 then it flows that it's the legal equivalent of what took
24 place here, which was the transfer, exercise dominion,
25 control, and authorized the transfer. If trustee wants to

Page 30

1 choose to try to unwind that transaction, the statute gives
2 him prerogatives to do that, but we think they're
3 (indiscernible - 1:08:14). That's our position.

4 THE COURT: Thanks.

5 MS. CHAITMAN: Good morning, Your Honor. Helen
6 Davis Chaitman, Becker & Poliakoff, on behalf of all of the
7 customers listed on the Exhibit A to our papers.

8 In addition to the argument that's just been made,
9 Your Honor, I just want to emphasize two points. First,
10 unlike the issue that was before the Second Circuit when the
11 November 30th, 2008 statements of all the customers
12 reflected ownership of securities, in this situation, every
13 transfer was in cash.

14 The transferor's account was depleted of the cash.
15 The transferee's account was credited with the cash, and
16 we're talking about transfers that went back into the 1970s,
17 '80s and '90s. We have not seen the documentary records
18 which support those transfers.

19 THE COURT: I'll ask you the same question I asked
20 Mr. Kirby. Would it make a difference if the trustee showed
21 you how he did it?

22 MS. CHAITMAN: Well, the fact of the matter is,
23 Your Honor, that I don't believe the trustee has the records
24 going back that far.

25 THE COURT: Well, that may be the trustee's

Page 31

1 problem, but, if he did -- and let's take more recent -- for
2 instance, if he has the records and he can show you to your
3 satisfaction the cash that went into a transfer account and
4 the cash that came out, would that make a difference to your
5 argument?

6 MS. CHAITMAN: Well, it wouldn't for this reason,
7 Your Honor. When the transfer is made, it has tax
8 consequences. If a transfer for \$1 million is made from
9 customer a to customer b, it's either a state taxable event,
10 a gift taxable event.

11 The money that is in the transferee's account and
12 the transferee is paying taxes on the income attributable to
13 that account. If you just say 10 percent, it's \$1 million,
14 and 10 percent a year, and you're paying short-term capital
15 gains rates taxes on that. So, for a period of 10 or 20
16 years, the transferee, who the Court is now discrediting
17 with all that money, has paid nonrecoverable taxes.

18 THE COURT: But isn't that -- I mean, it's an
19 unfortunate result, but isn't that true of all of the
20 litigation, even without the inter-account transfers?
21 People paid taxes on fictitious profits, and now, the
22 trustee is suing them for clawback money.

23 MS. CHAITMAN: That's right, but, when the
24 trustee, who, after all, is a fiduciary to the customers,
25 Your Honor, not to SIPA. The trustee's duties are to the

1 customers, and we're talking about --

2 THE COURT: Isn't he also a fiduciary of the
3 estate?

4 MS. CHAITMAN: Well, but the --

5 THE COURT: Because, if that were true, he could
6 never sue a customer.

7 MS. CHAITMAN: He has a duty to the customers at
8 large that constitute the estate, and, of course, he can sue
9 a customer for the benefit of the other customers, but the
10 issue here, Your Honor, is that SIPA was formed pursuant to
11 the Securities Investor Protection Act, which was intended
12 to enhance protections to customers. There is no support
13 for the proposition that a customer of an SEC-regulated
14 broker is not entitled to the transfer value in his account,
15 and, going back -- here, what's happening is, with all of
16 the cases, without regard to the statute of limitations,
17 without regard to the New York policy that there has to be
18 finality in commercial transactions for the economy to work
19 effectively, the trustee is saying to Mr. Blecker (ph), for
20 example, my 100-year-old client --

21 THE COURT: He's the one who had corporate checks
22 on his --

23 MS. CHAITMAN: Yeah, and the trustee, without
24 producing anything, has suggested that the trustee's records
25 indicate that these funds were deposited into Mr. Blecker's

1 account.

2 THE COURT: Have you preserved his testimony in a
3 deposition?

4 MS. CHAITMAN: We have not, Your Honor, and we
5 will do that, but the thing is, Your Honor, these checks
6 were made out to Coca-Cola.

7 THE COURT: But those are individual
8 determinations of the account. The question ultimately is,
9 in that case of Mr. Blecker, whether he got those checks and
10 cashed them, and I guess if he says I never got them and the
11 trustee doesn't have any other proof, Mr. Blecker will win.

12 MS. CHAITMAN: Well, I just hope he lives to get
13 to that point. We --

14 THE COURT: I wasn't being facetious when I
15 suggested that you take his deposition to preserve his
16 testimony.

17 MS. CHAITMAN: No, I think that's a very good
18 idea, Your Honor. You see, this, unlike the issue that was
19 before the Second Circuit, which was, if you have a
20 statement dated November 30th which shows securities in the
21 account and there were no securities, well, then it's a
22 fiction, but the trustee has not suggested that Madoff's own
23 records don't show the cash transfers, because they do.

24 So it's not a fictitious transfer. It was an
25 actual transfer at the time, just as 15 years ago, a client

1 could have withdrawn funds or any client could have
2 withdrawn funds from their account, and then, there wouldn't
3 be an issue as to what the value of their claim was because
4 they might no longer be a customer, but that transfer is on
5 the debtor's books and records.

6 There's no basis for the trustee to say that the
7 inter-account transfers are not on the debtor's books and
8 records. It would be different if it were a transfer by the
9 M stock, but that was never the case. These were all
10 transfers of cash, and this issue was never before
11 Judge Rakoff. It wasn't before the Second Circuit, and the
12 trustee places great reliance on the Denelle (ph) case in
13 the Ninth Circuit. It wasn't before the Ninth Circuit. It
14 wasn't a question in the Ninth Circuit case of inter-account
15 transfers. I really believe this is an issue of --

16 THE COURT: Wasn't it a question on buyout (sic)?

17 MS. CHAITMAN: It did occur on buyout. You're
18 absolutely right. Thank you very much, Judge.

19 THE COURT: Thank you.

20 MS. KEERP: Good morning, Your Honor.

21 THE COURT: Good morning. Trisha Keerp, from Skip
22 (ph), Dooney (ph) & Morris, on behalf of Brian Ross (ph).
23 Your Honor, Brian Ross invested with Madoff by two accounts.
24 The first was a shared account.

25 THE COURT: Okay, but this is the argument where

1 the trustee has to separately compute net investment for
2 every participant in a multi-party account?

3 MS. KEERP: As opposed to an account as a holder
4 (sic).

5 THE COURT: And that's an issue that I have to
6 decide in connection with this motion?

7 MS. KEERP: Well, Your Honor, the problem here is
8 that the trustee says that we're saying is irrelevant
9 because it's really a customer claim issue, whether he's a
10 customer or not.

11 THE COURT: Okay.

12 MS. KEERP: As opposed to -- right, as opposed to
13 the applicability of the net investment method to inter-
14 account transfers, but the trustee's whole wiping away of
15 Mr. Ross' claim is based on this very objection, the
16 application of the cash in, cash out to his --

17 THE COURT: But isn't the problem that somebody
18 else took the cash that Mr. Ross invested?

19 MS. KEERP: Well, Your Honor, and the trustee
20 raises it that, therefore, Mr. Ross should go after those
21 individuals on the account. But then, the trustee should
22 have done that as an avoidance action against those other
23 individuals.

24 THE COURT: Well, --

25 MS. KEERP: The thing is is that everyone treated

1 this first account separately. There is documentation of
2 the deposits and the withdrawals, and, if it is an issue of
3 whether there is -- of a customer claim -- whether this
4 individual was -- whether Mr. Ross was a customer, well,
5 then that should have been the basis for the trustee's
6 wiping out of that claim rather than the application of the
7 cash in/cash out method to the net --

8 THE COURT: Are you contending Mr. Ross is a
9 customer?

10 MS. KEERP: Well, Your Honor, we would -- if that
11 was the basis for their objection to that claim, then at
12 least we would have the opportunity to brief that out and to
13 address that issue.

14 THE COURT: But haven't you briefed that issue?
15 Your argument is that, in a multi-party account, the trustee
16 has to do a net investment analysis for every participant in
17 that account.

18 MS. KEERP: Your Honor, we haven't --

19 THE COURT: That's the legal issue that you raise.

20 MS. KEERP: And we haven't had an opportunity to
21 properly address that because the trustee's objection to
22 Mr. Ross' claim was -- well, first of all, in the
23 determination letter, we don't know --

24 THE COURT: But haven't you addressed it in your
25 opposition?

1 MS. KEERP: We have raised it, Your Honor, but not
2 to the full extent that it would be appropriate to present
3 it to the Court.

4 THE COURT: This issue -- and I don't know if I
5 have to decide it. The trustee said that I didn't. This
6 issue about multi-party accounts, whether in the ERISA
7 context or in some other context. I know it was raised by
8 many of the parties, and I question whether I can decide the
9 issue that the trustee says I should decide without also
10 deciding that issue. That's all.

11 MS. KEERP: Your Honor, who is going (sic) to be a
12 customer is an issue for another day, and we, as part of the
13 multi-payment briefing, will be addressing objections based
14 on those facts. It doesn't have anything to do with whether
15 factitious profit should be included in transfers between
16 accounts. It really has to do with whether, you know, under
17 the Morgan-Kennedy factors, someone had sufficient context
18 for him, but he only has to be considered a customer, and
19 that's just not an issue that's before you today.

20 But then, Your Honor, then we would ask that then
21 this issue not affect us negatively then when it does come
22 to determining Mr. Ross' claim then. This application of
23 the net investment -- this application of not crediting
24 fictitious profits, because our position is that, for Brian
25 Ross, it wasn't a moving around of fictitious profits,

Page 38

1 because he himself did, in fact, make those deposits with
2 his funds and withdrawal.

3 THE COURT: Would it be fair to say that you don't
4 object to the net investment method? What you object to is
5 the trustee's basically netting out all of the withdrawals
6 and the deposits in the transferor account, regardless of
7 who made those withdrawals or deposits?

8 MS. KEERP: That's right, Your Honor. And, to the
9 extent that the trustee is attempting to wholesale use that
10 position to disallow Mr. Ross' claim as opposed to really
11 entrust (sic), say, on that other issue that we're talking
12 about right now.

13 THE COURT: No individual claims are going to be
14 allowed or disallowed in the context of this motion. I just
15 question how I can decide the motion that the trustee raised
16 without deciding how to treat these multi-party accounts or
17 deal with the argument that's been raised by several people
18 based on the ERISA or some other principle that I have to
19 separately consider, you know, what each individual put into
20 the account and took out of the account.

21 MS. KEERP: Your Honor, I don't think it changes
22 basically the whole principle as to whether fictitious
23 profits can be transferred. In Brian Ross' case, if he were
24 to later be found as part of the multi-claimant action to be
25 an account holder, a customer, you know, the cash in/cash

1 out would be calculated based on his cash in and his cash
2 out.

3 THE COURT: Okay.

4 MS. KEERP: And so, that doesn't impact on whether
5 the transfers are being treated appropriately, Your Honor.

6 Your Honor, we would then again ask to make sure
7 then that Mr. Ross is being then treated according to that
8 other process that we (sic) then have set up for that
9 pleading.

10 THE COURT: What other process?

11 MS. KEERP: As far as the multiple -- as far with
12 regards to the ERISA and the other issue that is going to be
13 presented then.

14 THE COURT: I don't know if that issue is being
15 presented. I mean, I've gotten a lot of argument on it, but
16 that's what I'm trying to --

17 MS. VANDERWAL: We're working through the multiple
18 payment issues. We haven't, I don't think, gotten to this
19 specific issue, but we are getting there. We've had ERISA.
20 We've had heater (ph) funds. There's another multi-payment
21 issue that's been briefed before you currently, and we're
22 working through in some (sic) of the various issues related
23 to the context (sic).

24 THE COURT: Well, she's concerned how a decision
25 -- if I agree with you, how that decision was going to

1 affect Mr. Ross' claims. So tell me how it's going to
2 affect it and how it's not going to affect it.

3 MS. VANDERWAL: To the extent Mr. Ross is found to
4 be a customer, if he can satisfy the standards for a
5 customer, it would not impact on him. If the larger account
6 is the customer, the transfers within the account will be
7 treated as were discussed today.

8 THE COURT: So this motion doesn't raise the issue
9 of whether multiple parties in what appears to be a single
10 account on the BLMIS books and records are customers?

11 MS. VANDERWAL: No.

12 THE COURT: Okay.

13 MS. KEERP: And, just to be clear, because the
14 determination letter that we received never raised that
15 issue. So we were concerned whether Mr. Ross would then be
16 part of the trustee's consideration of whether he is a
17 customer or not.

18 THE COURT: It sounds to me like implicit in the
19 determination letter is the position that it was a single
20 account, but he's not a customer of that single account.

21 MS. KEERP: I mean, there was never a reference to
22 the fact that he's not a customer.

23 THE COURT: I mean, he has his own account now,
24 but --

25 MS. KEERP: Right.

1 THE COURT: -- the argument is that the transfer
2 came from a single account, and, in computing what was
3 transferred, the trustee just looked at all of the
4 distributions and the deposits into that earlier account
5 without regard to who made them or who took the money out.

6 MS. KEERP: Right, Your Honor.

7 THE COURT: So that issue -- you don't have to
8 deal with that issue because that's the trustee's position.

9 MS. KEERP: Right. So we would reserve our rights
10 on that, and, because that we are part of that participation
11 (sic).

12 THE COURT: Okay.

13 MS. KEERP: We (indiscernible - 1:22:05).

14 THE COURT: Thank you.

15 Anyone else?

16 MR. SAGOR: Your Honor, I'd like to go last since
17 I have, I think, the subset of the smallest issue. So, when
18 it all gets fleshed out, I think you'd understand me the
19 best. If I may go last, I would like to be heard.

20 THE COURT: You could always go last, Mr. Sagor.

21 MR. SAGOR: I don't think I'm -- what?

22 THE COURT: I know Mr. Sagor from the U.S.
23 Attorney's Office. So I see him once every couple of years
24 at the association (sic) events (sic).

25 MR. SAGOR: Do you want me first now?

1 THE COURT: What's your question?

2 MR. SAGOR: I'd prefer to go last.

3 THE COURT: He wants to go last.

4 Anybody object to that?

5 MR. HERZ: I'll go.

6 THE COURT: Okay.

7 MR. HERZ: Good morning, Your Honor. Joel Herz,
8 on behalf of the Sandia (ph) Family L.P. (ph) Partnership.
9 I want to -- I listened to the question you asked my
10 colleague was why can't the trustee do this, and I want to
11 bring it down to really sort of the most basic level of what
12 the statute says and what is really happening to my client
13 and I think many of the others.

14 And let's go back to 1990, where roughly my
15 client's transfers supposedly happened from account one to
16 account two, and let's make the facts something different,
17 which is let's assume that I have an account with Madoff.
18 Okay? I have \$3 million in that account, and my account,
19 according to the trustee, that entire \$3 million is
20 overdrawn already, which is from fictitious profits, and
21 let's --

22 THE COURT: This is the transferor account?

23 MR. HERZ: This is the transferor account that's
24 overdrawn by, let's just call it, \$4 million, for argument's
25 sake. Okay? You also at that same time have a Madoff

1 account, and you have \$1 in your account. Okay? It's
2 exactly that same dollar. Nothing has changed. You're net
3 even. No withdrawals, only one deposit for \$1.

4 We decide, you and I, to enter into a transaction
5 by which I decide to buy your home. You decide to sell me
6 your home, and let's make the purchase price -- maybe this
7 is unrealistic for the 1990s -- \$3 million. Okay? You get
8 my Madoff account of that entire \$3 million on the books and
9 records that the trustee has. It shows an account from Joel
10 Herz's account to Judge Bernstein's account.

11 Okay? And you're happy with Madoff. I happily to
12 this day, living in your house. Maybe I sell it to somebody
13 else along the way, and we're now to roughly 6 years ago,
14 2009, when this whole thing blows up. You don't make any
15 further touches to your account. No withdrawals, nothing.
16 Okay?

17 You make your claim, and let's say from the time
18 value of money, which I know has been addressed elsewhere,
19 your account has now mushroomed to \$14 million. You are
20 expecting to retire with that \$14 million, and you make your
21 claim, and the trustee writes back and says sorry,
22 Judge Bernstein, you're out of luck. The transfer --

23 THE COURT: I wouldn't be hearing this case, if I
24 were you.

25 MR. HERZ: Return it to one of your clerks. Okay?

Page 44

1 Sorry, Judge Bernstein, you're out of luck. Okay? The \$3
2 million home that you gave to me has a 0 value to you
3 because the other account that was transferred in to you,
4 okay, had a negative \$4 million, and, in fact, not only do
5 you get SIPA, let's assume you put more money in. You would
6 get subtracted on that because it's a transfer from account
7 a to account b.

8 And the question is why -- and that's what they're
9 trying to do in some different forums. Why can't they do
10 that, and the answer is really very simple. It's just it's
11 what the statute says, 11 U.S.C., Section 7(a)(111),
12 Subsection 11. In determining net equity under this
13 paragraph, which is the paragraph they're operating under,
14 accounts held by a customer in separate capacity shall be
15 deemed to be accounts on separate customers. Okay?

16 We then turn to the next place, and I believe, in
17 some way, the trustee agrees with me, and that is, if you
18 look at footnote 5 on paragraph 13 of their reply brief, it
19 specifically says examples of separate capacities are
20 individual accounts, joint accounts, individual retirement
21 accounts, and it goes on from there, and it says
22 specifically -- this is the last sentence.

23 It's the same person with two different accounts.
24 Let's just say you had Judge Bernstein individually account
25 a, Judge Bernstein individually account b. One had an over.

1 One had an under. Then they're combining those accounts,
2 and I'm not arguing that it's all in the same name, same
3 person.

4 Go on to the last sentence of their footnote on
5 page 13, footnote 5. If, however, claimant has an
6 individual Canton (ph) IRA account (sic), those are separate
7 capacities and are they would be entitled to separate SIPA
8 protection to a half million dollars for each account for
9 the two claims in this property.

10 And so, that's essentially -- I could speak for,
11 however, my client.

12 THE COURT: What does this have to do with the
13 sale of the house?

14 MR. HERZ: Well, because it comes back -- what
15 their argument's going to be -- well, wait a second,
16 Mr. Herz. Okay? There was no sale of the house. This was
17 -- and then, we'll come to my client's situation. Okay?
18 Which is --

19 THE COURT: You mean there was no sale of the
20 house?

21 MR. HERZ: In my --

22 THE COURT: I thought where you were going with
23 this was you thought you were getting x amount of dollars
24 for your house, and it turned out you weren't getting x
25 amount of dollars for your house, because the Madoff account

1 wasn't worth what you thought it was. And then, maybe you
2 have a claim against your transferor based on the stay
3 (sic).

4 MR. HERZ: Which is now long gone.

5 THE COURT: Right.

6 MR. HERZ: It's now -- and the same in my case.
7 Where we're going with this is very simple, which is the
8 Congress has set up separate rules as to when people are to
9 be treated for purposes of SIPA as separate customers with
10 separate accounts, and the answer to this of why we go there
11 is you're --

12 THE COURT: I don't think the trustee is arguing
13 that the transferor accounts and the transferee accounts are
14 separate accounts. Is he? Otherwise, we wouldn't even be
15 having this conversation.

16 MS. VANDERWAL: That's correct, Your Honor.

17 THE COURT: Okay. So all right. So where do we
18 go from there?

19 MR. HERZ: And so, that's my answer to my client
20 is they're separate customers. One was Samuel Diane Messing
21 (ph), tenants in common. Okay? The customer of today is
22 Sandia Partnership L.P. There are two separate customers.

23 THE COURT: Right.

24 MR. HERZ: With two separate accounts that can't
25 be merged together because --

1 THE COURT: He's not merging them. He's just
2 computing the value -- according to his method, his argument
3 is I'm just computing the value of what was transferred
4 ignoring (sic) fictitious profits. He's not combining
5 accounts for purposes of the \$500,000 or anything like that.

6 MR. HERZ: Then again, we come back to your issue,
7 which is, under that theory, you get nothing, even though
8 you've sold your house.

9 THE COURT: And that may be, and, you know, that's
10 what happened to Mr. Sincton (ph) in his case before the New
11 York Court of Appeals, and the Court concluded that, at
12 least in the divorce context, because it would have
13 disturbed that transaction, but it's essentially a dispute
14 between the transferor and the transferee.

15 MR. HERZ: Yeah, except --

16 THE COURT: And I don't mean to make light of it,
17 but there are a lot of unfortunate consequences about what
18 occurred here. People paid taxes on profits they never
19 really got. There was another instance of estate taxes
20 being paid.

21 MR. HERZ: Which have all been paid by my client,
22 but the distinction here is unless the -- what came from
23 account a of a different customer is now being treated as if
24 it's the same customer or if it's the same account, and
25 they're coming back and looking back beyond what the

1 clawback period is to treat something differently from a
2 different customer, and that, I believe, very clearly -- the
3 statute says if there's different customers, okay, they
4 can't be merged together. Each is entitled to separate
5 protection.

6 THE COURT: I got it. Thank you.

7 MR. HERZ: Thank you, Your Honor.

8 MS. WORMITZ: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MS. WORMITZ: Paula Wormitz, Stimmon, Wormitz,
11 P.C. I represent the customer, Michael Most. I only have
12 one client.

13 He was the beneficiary of three ERISA-protected
14 pension plans, two with Madoff, one with BLMIS. He received
15 final distributions from two of the pension plans in 1994
16 and 1998. So, if the trustee chose to bring a clawback
17 action against the pension plans to recover the fictitious
18 profits, they'd be barred by the statute of limitations, and
19 these funds were put into his IRA account, and the trustee
20 has discounted his IRA account by \$1.5 million.

21 THE COURT: Based on the rollover of the pension
22 plan?

23 MS. WORMITZ: Correct.

24 THE COURT: So you're making the statute of
25 limitations argument, which others have made?

1 MS. WORMITZ: Right. I have other arguments.

2 THE COURT: Okay.

3 MS. WORMITZ: Okay.

4 THE COURT: Go ahead. Go ahead.

5 MS. WORMITZ: One is that the distributions from a
6 protected ERISA plan are protected by the anti-alienation
7 provision. The trustee argued that IRAs are not protected
8 by ERISA, but it's actually the distributions from the
9 pension plans that are being discounted.

10 THE COURT: I didn't understand how the anti-
11 alienation provision, assuming it applied, had any
12 significance in the trustee's motion.

13 MS. WORMITZ: Well, --

14 THE COURT: What is the anti-alienation provision?
15 What does it prevent?

16 MS. WORMITZ: The ERISA, section 206(d)(1)
17 mandates that a pension plan governed by the statute, which
18 I claim my three pension plans do --

19 THE COURT: Okay.

20 MS. WORMITZ: -- shall provide the benefits
21 provided under the plan may not be assigned or alienated.

22 THE COURT: So what does that have to do with this
23 case? These are voluntary transfers, right?

24 MS. WORMITZ: Well, there were distributions --
25 there were distributions from a pension plan that he

1 received certain amount of cash, and now, the trustee is
2 saying no, that cash is not worth that. It's worth
3 something else.

4 THE COURT: Right.

5 MS. WORMITZ: And, to me, that's alienating part
6 of his distribution from the pension plan.

7 THE COURT: (Indiscernible - 1:32:22.)

8 MS. WORMITZ: The trustee also raised a case of
9 the Second Circuit case, Milgram against the Orthopedic
10 Associates.

11 THE COURT: Uh-huh.

12 MS. WORMITZ: 666 F3d. 68 as supporting their
13 position. But actually, it supports my position, because,
14 first of all, it notes the anti-alienation provision, and
15 then, it also notes that, where you sue an ERISA plan and
16 recover a judgment, you can only collect that judgment
17 against the plan. You cannot go against the beneficiaries.

18 THE COURT: But he's not -- you've made a claim in
19 the (indiscernible - 1:33:02). He's not suing -- you're
20 suing him, essentially. You've made a claim in the case.

21 MS. WORMITZ: I made a claim in the case.

22 THE COURT: Okay.

23 MS. WORMITZ: But what I'm saying is had he
24 brought a clawback action against the retirement plans and
25 said you got fictitious profits, even if he got a judgment

1 in the clawback action against the plan, he is limited by
2 statute --

3 THE COURT: But he's not doing that.

4 MS. WORMITZ: -- for recovery.

5 THE COURT: You're asking for money from him.

6 He's not asking for any money from him.

7 MS. WORMITZ: Well, that's --

8 THE COURT: I understand the argument that, if you
9 had withdrawn the money more than two years ago or more than
10 six years ago and then redeposited it, it would be treated
11 differently. I understand that argument. Is that the
12 argument that you're making?

13 MS. WORMITZ: Okay. Well, I just feel that this
14 has special protection, other than just normal withdrawals
15 from the one account and putting it into another account.

16 THE COURT: I understand that ERISA --

17 MS. WORMITZ: The fact that it's ERISA.

18 THE COURT: -- funds may have special protections,
19 but I don't understand how that relates to the trustee's
20 motion.

21 MS. WORMITZ: Well, because the trustee is not
22 giving my client credit for the full amount he received from
23 the distribution from the ERISA plans.

24 THE COURT: And how does ERISA bear on that
25 question?

1 MS. WORMITZ: I feel that that's -- the trustee
2 is, in fact, trying to alienate my client from the money.

3 THE COURT: Okay.

4 MS. WORMITZ: The other thing is, first of all, I
5 adopt the arguments of the other claimants, and especially
6 the fact that this is not a transfer between my client in
7 one form and my client in another form. These are two
8 different customers. These are pension plans of which he
9 was a beneficiary and my client's IRA. They're not inter-
10 account transfers.

11 And finally, you raised --

12 THE COURT: Why wouldn't they be inter-account
13 transfers?

14 MS. WORMITZ: Because, for the purpose of net
15 equity, as the gentleman had stated, each customer account
16 is supposed to be treated separately.

17 THE COURT: And I thought that the pension account
18 was transferred to the IRA.

19 MS. WORMITZ: Not the pension account. My
20 client's distribution from the pension plan.

21 THE COURT: Okay.

22 MS. WORMITZ: There were other beneficiaries in
23 the pension plan.

24 THE COURT: All right. Fair enough. So what are
25 you --

1 MS. WORMITZ: They got distributions, and they did
2 whatever they did with theirs. So there was a pension plan.
3 There was various beneficiaries.

4 THE COURT: Okay.

5 MS. WORMITZ: My client got a distribution of part
6 of it, of his share of the distribution, and he invested it
7 with Madoff.

8 And then, finally, just on the issue of the
9 disclosure, I noted the problems I've had trying to get
10 disclosure on this issue. I have no idea if these numbers
11 that the trustee used are correct. I sought disclosure on
12 the clawback action, and I was told I was not entitled to
13 the documents. The trustee has now said they will provide
14 me with the documents. So --

15 THE COURT: I think that's a wise position for the
16 trustee to take.

17 MS. WORMITZ: Yes, yes.

18 THE COURT: Okay.

19 MS. WORMITZ: So, just so you know, I am hopefully
20 going to get the documents.

21 THE COURT: Okay.

22 MS. WORMITZ: All right. Thank you, Your Honor.

23 THE COURT: Thank you.

24 Mr. Sagor, I guess it's you.

25 MR. SAGOR: I've been waiting a few years to

1 address this Court, and I was hoping to be before
2 Judge Lifland. My condolences. I'm equally happy to be
3 before Your Honor.

4 And I'm glad to see Mr. Pickard (ph) here. I was
5 hoping that by now, they would have seen the equity of what
6 I had to say and all I asked -- all I've asked for since
7 I've learned a little bit was to ask me to get -- ask them
8 to give me my cash back. I don't want a penny of fictitious
9 profit. I --

10 THE COURT: So you're not objecting to the net
11 investment method?

12 MR. SAGOR: Only in so far as at least it works
13 for me and maybe others. I want to be generous in it. It
14 doesn't work exactly. Judge Jakobs (ph) tells us what the
15 answer is in the Second Circuit opinion. Differing fact
16 patterns will inevitably call for different approaches.

17 Take the following hypothetical, which I was
18 sitting here in wonderment because Your Honor has really
19 started -- has dug down into the weeds here. Supposing one
20 day, when I was the small fry in my omnibus law firm account
21 where you only had to be a favorite of my senior partner to
22 have the honor of investing in Madoff -- if I took \$175,000
23 in the account that day, that account was a net winner.
24 Apparently, the widows of Howard Squadron and others took
25 out of the squadron account. I was a little person. I had

1 my pension in that waiting for a time when I'd get very old.

2 I think that time has come. I think I've been

3 hostage for a few years by Mr. Pickard. I think from a

4 reputable law firm to have 4(k)(1) showing that you put

5 \$175,000, which I so represent to the Court, I would like

6 this Court my \$175,000 back.

7 THE COURT: Mr. Sagor? Mr. Sagor, address me.

8 MR. SAGOR: Forgive me, Your Honor. It's a long

9 time, and it's painful. Maybe it's not much money for him.

10 Mr. Sheehan (ph) says these are nuances that -- I'm under

11 control, Your Honor. Maybe he says that nuances that have

12 not been determined by the -- but let me get to my

13 hypothetical.

14 THE COURT: I guess I don't understand. What is
15 your objection?

16 MR. SAGOR: My objection is that the way the net
17 equity works when you have a net -- an account that is a net
18 winner -- if you are looking at a net loser -- I am the net
19 loser in every respect. I didn't take out a penny. All I'm
20 asking for is my cash back.

21 THE COURT: So you want an individual --

22 MR. SAGOR: You get zero credit --

23 THE COURT: This is another one of those multi-
24 party accounts.

25 MR. SAGOR: Yes.

1 THE COURT: Where you want an individual
2 determination --

3 MR. SAGOR: Yes.

4 THE COURT: -- regarding your ins and outs?

5 MR. SAGOR: Yes, but not exactly, Your Honor.

6 Because whether there was no money left, that's a serious
7 argument to say that I'm now going to be -- it's bad enough
8 to be victimized by Mr. Madoff. I don't want to be
9 victimized by other people who took money out of the
10 account.

11 I'm told I could go sue the widows. I'm not going
12 to do that. And it doesn't matter.

13 Supposing I put in \$175 on Monday, and then, I got
14 my account which my law firm says you have to have your own
15 account. So one of the Madoff apperatatchniks (ph), I
16 thought graciously, said oh, you can have your own account,
17 even if you're a small person. Under their way they do the
18 template, when I would go to my next account, 1SO437, they'd
19 say you can't have any money from the old account because
20 that account was a net winner. That shows you the poverty
21 of the situation.

22 The Second Circuit says that what other customers
23 did should not aggregate what Madoff did. I have my own
24 account number, fortunately. I'm lucky, right? I'm account
25 1SO437. Evaluate me in terms of whether you're giving me

1 back any fictitious profit or not. The answer is no, and
2 give me back what I put in.

3 Now, I don't know whether the Madoff shows this,
4 but I could represent that this is money. In 1990, I put in
5 \$50,000. That meant a lot to me, and I thought it was being
6 put in a k(1) for my old age and pension.

7 In 1993, I put 20,000 and in 1995, 65,000 and in
8 1997, 40,000. Say what you want about Madoff, but, when he
9 said from the joint account that when I received -- I bought
10 some 600,000, they say I got 0 credit for my cash then.
11 Madoff wasn't giving me this money for charitable purposes.
12 Obviously, there had to be money in.

13 What difference does it make? I hate to use the
14 phrase what difference it makes because it's now politically
15 important. It shouldn't make any difference. I shouldn't
16 be victimized by what someone took out of that account. I
17 should get my cash back, and I think a nudge from you, a
18 nudge from the Second Circuit, everybody in this case to say
19 that the highest point of evaluation is what was your cash
20 in. What is your principal?

21 The whole idea here is to give people back the
22 full extent possible of their principal. Now, Mr. Pickard
23 says he wants to be generous. Mr. Sheehan says he wants to
24 be generous. That creativity -- and I have high regard for
25 Mr. Pickard. That creativity should go towards at least

1 when people have their own account to evaluate that account
2 on a full basis of determining what that person put in.

3 And I put in \$175,000. Forget about getting
4 interest on it or other things, I want that. And all I want
5 to have coming out of this, Your Honor, is for you not to
6 let my little brief get lost in the battle of the giants
7 here. Please look at my case individually. It's time, and
8 I hope my passion means something. I hope that they would
9 say he has a one off case, give him his money already --

10 THE COURT: Well --

11 MR. SAGOR: -- it's been years. And it makes a
12 difference to me --

13 THE COURT: I'm being --

14 MR. SAGOR: -- to have \$175,000 back.

15 THE COURT: I understand that. I'm being told by
16 the trustee that that is not an issue raised by the motion,
17 in other words whether --

18 MR. SAGOR: Well, they told me when I called them
19 not to give things out of --

20 THE COURT: Let me --

21 MR. SAGOR: -- school that this motion would
22 affect me and I'd better well get on it and they were
23 gracious to let me put in a brief. Before today when this
24 representative, the trustee, got up, I thought I was going
25 to be off with their heads, throw the baby out with the

1 bathwater, and off with the heads approach. And this is
2 expeditious. It saves SIPA money, but it's not right in
3 individual cases.

4 THE COURT: Thank you.

5 MR. SAGOR: Thank you.

6 MS. VANDERWAL: I just want to address, Your
7 Honor, a few of the points made starting with Mr. Kirby who
8 referred frequently to the statute, but the statute doesn't
9 require an avoidance action to determine a claim. A statute
10 requires that we look --

11 THE COURT: Well, what he's arguing is that
12 everybody agrees that what occurred between the first
13 account -- the earlier account and the later account was a
14 transfer. Once you call it a transfer, you have to go
15 through the procedures that the Bankruptcy Code incorporated
16 into SIPA said, and you have to avoid it. That's what his
17 argument is.

18 MS. VANDERWAL: I understand that, Your Honor.
19 First, the -- it would not be a fraudulent transfer, the
20 money never left BLMIS. It was a transfer within BLMIS. It
21 was just a book entry from one account --

22 THE COURT: But it's a transfer of rights.

23 MS. VANDERWAL: -- to another.

24 THE COURT: It's certainly a transfer of rights.

25 MS. VANDERWAL: That's correct.

1 THE COURT: Yeah.

2 MS. VANDERWAL: And -- but New York state law
3 provides that you can only transfer what you have a right
4 to. And in this case, the transferor did not have a right
5 to the fictitious profit in that account and could not
6 transfer it on.

7 THE COURT: But the transfer was of actual cash,
8 right?

9 MS. VANDERWAL: We agree that the books and
10 records of BLMIS indicate that a transfer occurs. And the
11 fact of a transfer is indicated in the amounts --

12 THE COURT: Also the amount is indicated?

13 MS. VANDERWAL: Right, but the amount is not --
14 it's fictitious. It's a created amount --

15 THE COURT: Well, the --

16 MS. VANDERWAL: -- based on fictitious securities'
17 activities in the account that gave rise to an account
18 balance that was not real. And I'd just like to refer the
19 Court back again to (indiscernible - 1:45:00) decision and
20 Bayou where the Court noted that giving credit for these
21 transfers is just piling fiction upon fiction upon fiction.
22 It's fictitious profits in the transferor account. It
23 continues to be fictitious profits as it passes to the
24 transferee account.

25 I think, as Your Honor noted, Ms. Chaitman raised

Page 61

1 issues about paying taxes and other impacts. That's no
2 different than in the withdrawals' setting. People pay
3 taxes on fictitious profits they received as withdrawals.
4 It's no different in the transferor setting and there's no
5 reason to make that distinction.

6 Extremely briefly, I want to recite, Your Honor,
7 there's no avoidance action here. ERISA doesn't implicate
8 on the calculation of claims and even if it did, ERISA has a
9 subordination provision built into it which makes it --
10 which provides that it can have no impact on any other
11 statute. So, to the extent it would require a result
12 different from SIPA that it would be subordinated to SIPA.

13 Mr. Sagor falls into the same category as
14 Mr. Ross. He's an investor in a shared, pooled account.
15 His issue is whether or not he's a customer that's not an
16 issue --

17 THE COURT: Well, what is --

18 MS. VANDERWAL: -- for today.

19 THE COURT: As I understand it, his argument is a
20 little more nuanced and he's saying, look, I can show you
21 how much I put in and how much I took out, and that should
22 be what I'm entitled to. And the fact that other people
23 took money out of that original transfer account shouldn't
24 affect that determination. I guess it's the same argument
25 that several people have made.

1 And you're telling me I don't have to deal with
2 that now and I don't know how I avoid it, because implicit
3 in the rejection of all of these claims is that position.
4 So why don't you just file a supplemental briefing and let
5 anybody brief that issue and deal with it.

6 MS. VANDERWAL: We do intend to brief that issue,
7 but it doesn't impact on whether a transfer includes
8 fictitious profit or not. Mr. -- his issue is what -- is
9 whether or not he is a customer or he is an investor in a
10 customer. It doesn't affect whether the net investment
11 method should be applied.

12 THE COURT: All right.

13 MS. VANDERWAL: I just -- I'd also like to --
14 Ms. Chaitman raised the trustee's duty to various investors.
15 And the trustee, in fact, as Your Honor mentioned, his duty
16 isn't to the entire estate. It has to determine what's
17 equitable for everyone here. And we -- there are -- the
18 trustee is sympathetic to the issues that have been raised
19 today.

20 Unfortunately, arguments that are based solely on
21 the equities, as the Second Circuit stated in Packer Wilbur,
22 cannot succeed. The trustee cannot reduce other people's
23 principal to allow people to retain fictitious profit. It's
24 just not the appropriate approach for all of the customers
25 of this (indiscernible - 1:47:57).

Page 63

1 THE COURT: Thank you. I'll reserve decision.

2 Thank you very much.

3 (Whereupon these proceedings were concluded at 11:50

4 AM)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T I O N

2

3 We, Nicole Yawn and Jamie Gallagher, certify that the
4 foregoing transcript is a true and accurate record of the
5 proceedings.

6

7 **Nicole Yawn**

8

Digitally signed by Nicole Yawn
DN: cn=Nicole Yawn, o=Veritext,
ou, email=digital@veritext.com,
c=US
Date: 2014.06.20 16:49:17 -04'00'

9

Nicole Yawn

10

11 **Jamie**
12 **Gallagher**

13

Digitally signed by Jamie Gallagher
DN: cn=Jamie Gallagher, o=Veritext,
ou, email=digital@veritext.com, c=US
Date: 2014.06.20 16:51:38 -04'00'

14

Veritext

15

330 Old Country Road, Suite 300
Mineola, NY 11501

16

Date: June 20, 2014

17

18

19

20

21

22

23

24

25